DOCUMENT RESUME

ED 056 408 EA 003 865

AUTHOR	Colley, Nathaniel S., Jr.
TITLE	Public School Desegregation in California Historical Background. School Desegregation Bulletin Series.
INSTITUTION	California Univ., Riverside. Western Regional School Desegregation Projects.
PUB DATE	Sep 71
NOTE	32p.
EDRS PRICE	MF-$0.65 HC-$3.29
DESCRIPTORS	Court Cases; Defacto Segregation; Dejure Segregation; *Legal Problems; *Minority Groups; School Attendance Laws; *School Integration; *School Law; *School Segregation
IDENTIFIERS	California

ABSTRACT

This paper first traces the history of racial segregation in the California Public Schools, revealing that while the first California constitution provided for a system of common schools, the schools were initially common to white pupils only. The paper then demonstrates that the State has an affirmative duty under the 14th Amendment to end public school racial segregation wherever it exists no matter what its cause. The paper concludes by arguing that there can be no such thing as de facto segregation in public schools. According to the author, all such segregation is de jure because public school officials compel attendance, fix zones and boundaries, and make school attendance assignments. (Author)

ED056408

U.S. DEPARTMENT OF HEALTH,
EDUCATION & WELFARE
OFFICE OF EDUCATION
THIS DOCUMENT HAS BEEN REPRODUCED EXACTLY AS RECEIVED FROM THE PERSON OR ORGANIZATION ORIGINATING IT. POINTS OF VIEW OR OPINIONS STATED DO NOT NECESSARILY REPRESENT OFFICIAL OFFICE OF EDUCATION POSITION OR POLICY

EA 003 865

ED056408

PUBLIC SCHOOL DESEGREGATION IN CALIFORNIA HISTORICAL BACKGROUND

by

Nathaniel S. Colley, Jr., Esq.

Regional Dissemination Module
Western Regional School Desegregation Projects
University of California
Riverside, California ©

"PERMISSION TO REPRODUCE THIS COPYRIGHTED MATERIAL HAS BEEN GRANTED BY
Western Regional School Desegregation Projects
TO ERIC AND ORGANIZATIONS OPERATING UNDER AGREEMENTS WITH THE U.S. OFFICE OF EDUCATION. FURTHER REPRODUCTION OUTSIDE THE ERIC SYSTEM REQUIRES PERMISSION OF THE COPYRIGHT OWNER."

September 1971

PREFACE

More than 100 years ago, five years after the end of the Civil War and 20 years before the famous "separate but equal" doctrine was established by the Plessy vs. Ferguson case, the California Supreme Court upheld the denial of admission of an eleven year old child to the school nearest her home. The grounds for denial stated that she was of African descent and that separate school accommodations had been provided for those of her color. No mention was made of "equal" educational opportunity. From this point in California history until the present time the practice of school segregation and ethnic imbalance has been actively perpetuated by sanction of school administrations at all levels, and by mandate of the general population.

Dr. Colley has skillfully recorded the progression of legal hallmarks that document the historical journey from legalized to illegalized isolation of minorities in our education system. Interestingly, there are more children attending racially imbalanced schools today than at any other time in California's history.

Attorney Colley's direct involvement in court cases dealing with desegregation, and his talent for discussing legal matters in a succinct and lucid fashion make this monograph both authoritative and highly readable.

Dr. Nathaniel S. Colley is a National Board Member and West Coast Regional Legal Counsel for N.A.A.C.P.

PUBLIC SCHOOL DESEGREGATION IN CALIFORNIA

HISTORICAL BACKGROUND

Racial segregation in the public schools of California has a long and checkered history. Though California was admitted to the Union prior to the Civil War as a free state,[1] its original constitution[2] was silent on the question of racial segregation in the public schools. It did, however, provide that there should be maintained a system of common schools, and a state superintendent of public instruction was called for so the schools could be administered.[3] The practice and custom in California between 1849 and 1870 with reference to school segregation is not easy to document, but it is probable that segregation was the rule for the few black children who found their way into the public school system to attend separate make-shift public schools. St. Andrews African Methodist Episcopal Church in Sacramento, for example, was the site of the segregated school for blacks in that city throughout the 1850's.[4]

On April 4, 1870, the California Legislature enacted "The School Law of California". It addressed itself to the questions of racial segregation in education as follows:[5]

> "Sec. 53. Every school, unless otherwise provided by special law, shall be open for the admission of all white children between five and twenty-one years of age residing in that school district, and the Board of Trustees or Board of Education shall have power to admit adults and children not residing in the district, whenever good reasons exist for such exceptions."
>
> "Sec. 56. The education of children of African descent and Indian children shall be provided for in separate schools. Upon the written application of at least

> ten such children to any Board of Trustees or Board of Education, a separate school shall be established for the education of such children; and the education of a less number may be provided for by the Trustees, in separate schools, or in any other manner."

The Board of Education of the City and County of San Francisco followed with its own regulation which read:[6]

> "Children of African and Indian descent shall not be admitted into schools for white children; but separate schools shall be provided for them in accordance with the California School Law."

A test of the constitutionality of these segregation statutes was not long in coming. When Harriet A. Ward, who described herself as being of African descent and a colored citizen of the United States and of the State of California, on July, 1870, took her eleven year old daughter, Mary Frances Ward, to the nearest public school and demanded that she be received and taught, the stage was set for the first challenge of racial segregation in California Public Schools.[7] Her admission was denied on the ground that both the California School Law and the regulations of the Board of Education of the City and County of San Francisco made it unlawful to accept her. She thereupon filed an original petition in the California Supreme Court for a writ of mandate to compel her acceptance by the school in question.

The contentions of the parties made there have a familiar ring. Mr. John W. Dwinelle, counsel for petitioner, argued that the California School Law was unconstitutional in that it:

(1) Violated the Civil Rights Bill of April 9, 1866.

(2) The 14th Amendment to the U.S. Constitution.

In support of his position he addressed the Court as follows:

> "We know that persons of African descent have been degraded by an odious hatred of caste, and that the Constitution of the United States has provided that this social repugnance shall no longer be crystalized into a political disability. This was the object of the Fourteenth Amendment, and its terms are above being the subject of criticism. We know, too, that a State must always have laws equal to its obligations."[8]

Mr. Dwinelle relied upon the case of the People vs. the Board of Education of Detroit[9] in support of his contention that separate schools in and of themselves represented a denial of equal rights to those segregated. The Michigan statute in the Detroit case merely provided that "all residents of any school distrcit should have equal rights to attend any school therein." The issue was whether separate schools for persons of African descent complied with the mandate of the law. It was held that they did not. A similar case from Iowa[10] was also said to be persuasive because Iowa's law which provided that there should be maintained "a system of common schools" was interpreted so as to prevent separate schools. Counsel for petitioner in the Ward case urged that "common schools" meant "common to all citizens" and hence none could be excluded on account of race or color alone. Hence, he claimed, the California School Law violated its own constitution.

Counsel for the San Francisco School Board, over twenty years before its articulation in the now infamous case of Plessy vs. Ferguson, [11] announced and relied upon the "separate but equal" doctrine. He said:

> "But we find a full answer to this proceeding in the fact that colored children are not excluded from the public schools, for separate schools are provided for them, conducted under the same rules and regulations as those for white, and in which they enjoy equal, and in some respects superior educational advantages.
>
> So far as they are concerned, no rule of equality

> is violated - for while they are excluded from schools for white, the white are excluded from the schools provided for the Negro."[12]

The San Francisco School Board also urged that the police power of the state fully authorized adoption of a scheme for racially segregated schools.

The California Supreme Court or at least the author of the opinion, adopted the "separate" part of the doctrine of "separate but equal" and denied Mary Frances Ward admission to the public school nearest her home. It concluded by saying:

> "In order to prevent possible misapprehension, however, we think it proper to add that in our opinion, and as a result of the views here announced, the exclusion of colored children from schools where white children attend as pupils, cannot be supported, except under conditions appearing in the present case; that is, except where separate schools are actually maintained for the education of colored children; and that, unless such separate schools be in fact maintained, all children of the school district, whether white or colored, have an equal right to become pupils at any common school organized under the laws of the State . . ."[13]

Nowhere in its opinion did the court address itself to the question of whether the separate schools had to be equal.

The California Supreme Court hearing the case consisted of three justices. Chief Justice Wallace wrote the opinion. Associate Justice Rhodes neither concurred nor dissented. The records merely show that he did not express an opinion. Associate Justice McKinstry concurred in the judgment denying the writ on the first ground stated by Chief Justice Wallace. That ground was technical in nature, and was based upon the holding that petitioner had not proved that she was otherwise qualified to be admitted to the school in question. Chief Justice Wallace said

that one who seeks mandate always has the burden of proving that he has a clear right to the relief sought, and if any lawful reason exists for denial of the right, denial will be affirmed even though the public official based his denial upon another consideration. It was this ground alone in which Justice McKinstry concurred.[14] Whether he and Justice Rhodes refused to expressly join in the second or alternative constitutional ground for denying the petition for the writ was based upon their rejection of the separate "school" doctrine is not known. It could well have been that they thought the discussion of the constitutional issue to be unnecessary, and for that reason refused to concur in it. In any event, the opinion approving separate schools for blacks in public school system received the overt blessing of but one member of the three man California Supreme Court.

While admitting that he acted pursuant to the California School Law of 1870 when he excluded petitioner, respondent school principal Flood also denied in his answer that petitioner was otherwise qualified for admission to Broadway Grammar School. He averred that "Broadway Grammar School was then, and is now of the description called a grade school, which signifies that the pupils in it are classified into distinct grades, according to the instruction they may respectively require; but this defendant avers that the lowest grade in said Grammar School was and now is the sixth grade, into which the petitioner had not received sufficient instruction to enable her to enter.[15]

Interestingly enough, the principal of the white school went on to affirm that the petitioner was at the time in the seventh grade in the separate school maintained by the San Francisco School District " for colored children or children of African descent." It is obvious that if

a seventh grade student from one school had not been taught enough to even qualify for admission to the sixth grade in the other, the schools were "separate" but hardly "equal".

The other ground relied upon by the San Francisco School District was that petitioner did not present a certificate of transfer from the segregated school which she had been attending. The District rules made such a certificate a prerequisite for such transfer. It is almost certain, however, that the principal at the segregated school would have not issued a certificate of transfer in open defiance of the provisions of the California School Law providing for racial segregation.

The California School Law of April 4, 1870, was codified in 1872,[16] with one significant change. It specifically established that if no separate school was provided for children of African descent and Indian children, such children must be admitted into the schools for white children. In 1880, the California Political Code was revised to delete the word "white" before the word "children", and thus made to read in part as follows:[17]

> "Every school, unless otherwise provided by law, must be open for admission of all children . . ."

Between the years 1880-1883, California had no statute requiring segregation of the races in public schools. Thus, when a child of Chinese ancestry was denied admission to the public schools of San Francisco, his admission was compelled by the State Supreme Court.[18] This victory for the Chinese, however, was short lived. In 1885 the California Legislature amended the Political Code to provide that separate schools could be provided for children of Mongolian or Chinese descent. The section as amended read:

> "The governing body of the school district shall have power to exclude children of filthy or vicious habits, or children suffering from contagious or infectious diseases, and also to establish separate schools for Indian children and for children of Chinese, Japanese or Mongolian parentage. When such schools are established, Indian children or children of Chinese, Japanese or Mongolian parentage must not be admitted into any other schools."

The foregoing section was unsuccessfully challenged by the pupil of Chinese descent in 1902.[19] There the doctrine of "separate but equal" was applied, and the statute was held to meet the constitutional standard as announced in Plessy vs. Ferguson.[20]

Sections of the California Political Code relating to the public schools were transferred to the California School Code in 1929.[21] When that code became the Education Code the provisions permitting separate schools for children of Chinese, Japanese and Mongolian parentage were continued in force and effect[22] until 1947, when they were repealed. The School Code continued in force a 1917 statute which provided that Indian children could be excluded from the public schools if there was a Federal Indian school nearby. This section was repealed in 1931. In 1924, in the case of Piper vs. Big Pine School District, it was held that this statute could not justify exclusion of an Indian child from the public schools.

No California statute provided for the segregation of children of Mexican descent in the public schools.[23] It has always been the law in this State that since public education is a State function, no school district has authority to enforce, by its own rules, racial segregation in the public schools. Thus, when a Tulare City School District principal denied a black pupil admission to the white school, the State Supreme Court, finding no statute to justify the action, ordered him admitted.[24]

While Brown vs. Board of Education,[25] the historic school desegregation case, sounded the death knell to all statutes and decisions requiring racial segregation in the public schools, the history of officially sanctioned racial segregation, nevertheless, has continued significance. This is because when the constitutionality of state actions such as school site selection, fixing attendance areas or zones for pupils, and assignment of teachers are considered, the history of the state in dealing with racial segregation in the public schools in the past may well shed light on the purpose and probable effect of present schemes.

California, to the utter surprise and dismay of many of its citizens, has for over a century sought to effectively segregate one ethnic minority or the other. First it was blacks and Indians. Then it was Orientals and Indians. While Mexican Americans were never singled out by statute for segregation in public schools, this does not mean that individual school districts did not achieve the same result.[26]

THE AFFIRMATIVE DUTY OF THE STATE TO ELIMINATE RACIAL SEGREGATION IN THE SCHOOLS

Since the equal protection clause of the 14th Amendment to the United States Constitution has been the traditional and usual weapon used to interdict racial discrimination by States and their agencies, its language bears some analysis and brief discussion. Section 1 of that Amendment reads as follows:

> "Sec. 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State within they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property

> without due process of law; nor deny
> to any person within its jurisdiction
> the equal protection of the laws."

It will be noted that the entire language of the section is prohibitory. It speaks of things no State shall do, but makes no reference to what each State must do. A simplistic inference could be drawn that it imposes no affirmative duty upon the States to follow any particular course of action with reference to its citizens. Closer analysis, however, will show that the prohibition against "enforcement" of discriminatory laws in reality imposes an affirmative mandate. For example, if such a law is enforced or carried out, "affirmative" action would be necessary. The section prohibits such action. If a school district, an arm of the State, finds its schools segregated because of prior law or custom, to continue to allow them to remain so would be "enforcing" the prohibited law. In order to change to a system of desegregation, the district would have to affirmatively develop and carry out a plan to end the past wrongs. This may well involve such affirmative action as redrawing school zone lines, fixing of new attendance areas, the bussing of students, or assignment of teachers on a racial basis in order to achieve desegregation.

In a State or school district in which racial segregation in the public schools has been the prior practice, the constitutional mandate to desegregate could never be met except by affirmative action. As one United States District Court said:

> "The duty to disestablish segregation is
> clear . . ., where such school segregation
> policies were in force and their effects
> have not been corrected."

While some federal courts[27] have erroneously held that no such affirmative duty exists, the point is no longer open for argument. In Swann vs.

Charlotte - Mecklenburg Board of Education, 39LW 4437, decided by a unanimous United States Supreme Court on April 20, 1971, the question was settled so far as state imposed racial segregation in the public schools is concerned. There it was held that if the State defaults in its affirmative duty to eliminate all vestiges of state imposed segregation, it is the duty of the U.S. District Court to devise or approve a plan of affirmative action.[28] In that case racial quotas, specially drawn attendance zones, and bussing of pupils were all approved as appropriate affirmative action plans.

In the earlier case of Green vs. County School Board,[29] the United States Supreme Court said:

> "The burden on a school board today is to come forward with a plan that promises realistically to work . . . now . . . until it is clear that state imposed segregation has been completely removed."[30]

DE JURE vs. DE FACTO SEGREGATION

De jure segregation, as the term is commonly used, means only that it is imposed or enforced by law, while de facto segregation refers to that which exists in fact but its origin and support may not be found in official action. While Brown vs. Board of Education,[31] held in unequivocal language that "in the field of public education the doctrine of "separate but equal" has no place, and that "separate educational facilities are inherently unequal", the debate as to which brand of segregation is imposed upon a child still rages. It is extremely doubtful, however, whether a single small child anywhere will recognize his segregation as de facto, and hence not harmful, or de jure and hence of the kind which does harm to his attitudes and achievements for the remainder of his life. All too often it is forgotten that it is the mere fact that segregation which was

condemned in Brown as harmful, and it should make little difference what caused it.

A close reading of the Swann case,[32] however, leads to the inescapable conclusion that Chief Justice Burger, and those on the United States Supreme Court who follow his lead, are not yet prepared to forget the dichotomy between de jure and de facto segregation. Throughout the opinion the duty of the state to eliminate segregation is anchored to that segregation which the state created - de jure segregation. So far as the U.S. Supreme Court is concerned, those seeking to interdict so-called de facto segregation may do well never to call it by that name. The effort should be made to show that it is state imposed or enforced, even though the hands of public officials involved may be hidden. This is seldom an impossible task. Most school zone lines and attendance areas in metropolitan cities were not bulging with racial minorities who have now flocked to urban areas in great numbers. Since a child usually has to attend public school in the area or zone to which he is assigned, often he is compelled to attend a segregated school because of boundary lines which were drawn by school districts many years ago. In such a case the legal approach must be to find this de jure segregation and hence prohibited by the Brown decision. After all, in such a situation the school district is clearly "enforcing" a school boundary law which results in racial segregation. The 14th Amendment, in express terms, prohibits "enforcement" of such laws as well as the "making" of them.

Often it is said that racial segregation which results merely from racial housing patterns is de facto only and may not be legally prohibited.[33] What this view overlooks is that public school children usually attend school where they are assigned by reason of school boundary laws and

attendance area. If as these exist at any particular time a child must attend a racially segregated public school, that school district is "enforcing" racial segregation as fully as if it had adopted a zoning plan designed to achieve the same result. The new legal emphasis must, therefore, be upon the fact that it is just as unlawful under the 14th Amendment to "enforce" segregation as it is to "create" it.

Even the United States Supreme Court needs to be reminded of the dual thrust of the prohibition of the 14th Amendment. In one of its most enlightened opinions,[34] it ordered only the complete removal of "State-imposed segregation". It did not address itself to "state-enforced" segregation, yet that is also a command of the 14th Amendment.

In reality, in the field of public education all segregation of the races is de jure, because it is either "imposed" by the state or its agencies or "enforced " by them. They, and they alone, control the school system. They, and no one else, assign pupils to particular schools. If the school to which a child must go by mandate of the state compulsory school law is a segregated one, the state has clearly "made" or "enforced" a law which results in his segregation.

There is another reason that the term "de facto segregation" should pass from our language. For a century the United States Supreme Court has repeatedly and uniformly held that the 14th Amendment interdicts state action only, and has no application to action by individuals whose conduct is not significantly involved with state action.[35] It is asking too much of the Court, or at least it is asking more than is ever likely to be had, to suggest the elimination of the requirement that state action shown before the 14th Amendment is brought into play. The very phrase "de facto" suggests a non-legal concept. The Court has been far too long

looking at life through "de jure" eyes to expect it to suddenly say it will look beyond legal concepts.

The affirmative duty of the state to take action designed to prevent the "making" or "enforcing" of discriminatory laws must remain the central challenge. Inaction in the face of actual segregation would seem to be a clear abnegation of that affirmative duty, and hence a denial of equal protection. Professor Charles L. Black, Jr. of the Yale Law School, articulated this view as well as anyone could when he wrote:

> "When a racial minority is struggling to escape drowning in the isolation and squalor of slum-ghetto residence, everywhere across the country, I do not see why the refusal to throw a life preserver does not amount to a denial of equal protection."[36]

Likewise, if school officials see minority ethnic group children stagnating the ghetto schools which they are compelled by zoning or attendance laws to attend, failure to act to save them is just as much denial of equal protection as would be the enactment of an ordinance saying in express terms that these children are consigned to the slum schools to hunt and peck for learning and maintenance of their integrity as human beings. Hence, it is more realistic to view all public school segregation as de jure, or better still, to cease the futile exercise in semantic dichotomy and call a spade a spade. School segregation can be shown to mark the state action, so long as there are compulsory school laws, fixed school district boundaries, and set attendance areas.

In Jackson vs. Pasadena City School District,[37] the California Supreme Court set the only practical and legal approach to ending racial segregation in the schools. The rule announced there is straight forward and easy to understand. The court summarized the rule in Mulkey vs.

Reitman[38] as follows:

> "The state, because it has undertaken through school districts to provide educational facilities to the youth of the state, was required to do so in a manner which avoided segregation and unreasonable imbalance in its schools."

What the Court was clearly saying was that once the state assumed the responsibility of operating a public school system, it had the constitutionally mandated duty to operate it without segregation and racial imbalance, regardless of its cause.

> "The right to an equal opportunity for education and the harmful consequences of segregation require that school boards take steps, so far as reasonably feasible, to alleviate racial imbalance in schools regardless of its cause."[39]

Nothing is said there about whether the segregation is de facto or de jure. In California, racial segregation and racial imbalance in the public schools are legally condemned. Racial segregation refers to the situation in which there is a total absence of white children from a school. Racial imbalance exists when the percentage of minority ethnic group children in a school significantly exceeds that groups' percentage in the general population. The Jackson case condemns both.[40]

This is without reference to whether they were caused intentionally, accidently, or just grew like topsy. Whenever and wherever they occur, it is the duty of the school district to take affirmative, corrective measures.

STATE vs. DISTRICT AFFIRMATIVE ACTION

Even though education has been recognized since California's original constitution[41] as a state function, all of the early litigation concerning racial segregation in the public schools has been against individual school

districts, brought on an individual basis by an affected student. The more recent cases, however, are almost universally class actions, brought by one or more black pupils on behalf of himself and all others similarly situated, with a particular school district as the respondent.[43]

In a way, it is rather an anomoly that the California Attorney General has attacked the problem of racial segregation on a district basis,[44] while in fact it is the State itself that has failed to exercise its full powers in formulation of specific mandatory regulations for the districts to follow. For a decade Title 5, California Administrative Code, has dealt in a general way with school segregation. These are regulations promulgated by the State Board of Education. They declare the Board's policy to be that "person or agencies responsible for establishment of school attendance centers or the assignment of pupils thereto shall exert all effort to avoid and eliminate segregation of children on account of race or color." The school districts are ordered to consider a number of factors in their efforts to eliminate racial segregation. No sanctions, however, of any kind are provided. The regulations or guidelines have more recently been strengthened by requiring each school district to make an ethnic survey, and by defining ethnic imbalance as the situation which exists when the pupils of one or more other ethnic groups in a school differs by more than 15% from that in all the school district. There remains, however, no sanctions against non-compliance.[45]

The Attorney General had actions pending against several school districts to compel them to eliminate racial imbalance in their respective school districts at the same time that he was called upon to defend the State Board of Education in an action brought to enjoin repeal of existing desegregation regulations.[46] At its March 12-13, 1970, meeting the State

Board of Education, angered by Judge Gittleson's decision in Crawford vs. Los Angeles Board of Education, Los Angeles Superior Court No.822954, hastily repealed its own desegregation regulations on the grounds that courts were using them as a basis for compelling the school districts to desegregate the public schools, and this result was never intended by it.[47] The Board President, Mr. Howard Day, stated it this way:

> "First, as Dr. Rafferty has indicated, our original good intentions in adopting Sections 2010 and 2011 have been distorted out of their original context by certain recent court decisions. It was never the intention of the State Board of Education as it existed in 1969 to have judges use our advisory guidelines as ironclad rules of law."

Mr. Day then recommended repeal of the guidelines on an emergency basis. The emergency was expressly declared to be citation of the guidelines in court proceedings and reliance upon them as law by judges. That emergency, according to the Board, posed an immediate threat to the public peace, health, and safety and general welfare.[48] Upon motion duly made and seconded, the emergency was found to exist and the guidelines were repealed in total.

The Board scheduled its next meeting in Sacramento in May 1970, to make the emergency repeal permanent, but was met instead by a temporary court order enjoining it from doing so.[49] On May 27, 1970, the temporary order was made permanent. The Attorney General, representing the Board, conceded that no emergency existed, and hence the repeal without notice was invalid.

At the September 1970, meeting of the State Board of Education a resolution to amend the guidelines to make it clear that bussing of pupils was not required was proposed but not acted upon.[50] The amendment

would also have eliminated the definition of racial imbalance. At the September 1970 meeting over a dozen persons representing a wide spectrum of civic and educational groups appeared or filed statements in opposition to the proposed changes.

The public hearing on the proposed weakening of the desegregation guidelines was continued to the October, 1970 meeting of the State Board of Education, at which time a large number of civic, political, and educational leaders addressed the Board. The meeting adjourned without any official action on the proposed changes, as of this date, the desegregation guidelines remain as they existed prior to the abortive effort to repeal them at the March 1970 meeting of the Board.

The failure of the State Board of Education to repeal the desegregation guidelines of the California Administrative Code has hardly been due to the fact that it now believes in them. It has never recanted its March 1970 official declaration that it was not intended that the guidelines should have the force of law. Failure to repeal the guidelines probably resulted from the Sacramento County Superior Court injunction, and from the broad support they were shown to have when the public hearings to repeal them were held.

A few California school districts, almost always under the compulsion of court decrees,[51] have advanced desegregation plans.[52] Yet, as of 1970, according to the State Department of Education,[53] racial imbalance in the public schools of California was widespread indeed. It was reported that Los Angeles City Unified School District alone has 550 racially imbalanced schools. San Francisco had 114, San Diego 91, Oakland 72, Fresno 49, San Bernardino 42, San Jose 42 and Sacramento 33. It seems clear that in urban centers racial imbalance is the rule rather than the

exception.

While it must be conceded that some school districts are trying in good faith to correct the massive racial imbalance in their schools, we see no reasonable prospect for divergent local plans to achieve the desired result. Because education in California is by its statutes and constitution a state function, and is state financed, it is idle to expect this problem to be solved on a district by district basis. The various court instigated or court approved local plans are often expensive. The districts themselves have almost no economic resources, and must look to the state for financial aid for support of its ordinary and usual programs. It should also look to the state for guidance and financial aid in solving the problems of racial segregation and imbalance in the schools.

The N.A.A.C.P. will file a suit in 1971 against the State Board of Education to compel it to develop and finance a statewide plan for elimination of racial segregation and imbalance in the public schools.[54] The continued attack upon the problem on a district by district basis would exhaust the resources which could well be spent for other purposes. What is more, local plans will never be really effective because if they are good they are expensive, and if they are expensive the districts cannot afford them.

While significant legal victories were won in a vast majority of the district by district cases, the number of public schools in which there is substantial racial imbalance seems to be increasing. These cases, however, have been vital in that they have resulted in several very scholarly and useful court opinions dealing with the perplexing problem of racial imbalance in public schools. The Los Angeles[55], San Francisco[56]

and Inglewood[57] decisions are particularly outstanding, and each should be read by any serious student of this problem. Each of the decrees recognize that correction of racial imbalance in the public schools will require some bussing of students. Judge Stanley A. Weigel's comments on the use of buses to correct racial imbalance in the public schools in his decision in the San Francisco case are interesting and significant. He said:

> "The evidence demonstrates that there simply cannot be desegregation without some bussing of some students because there are districts in the city in which there are great preponderances of members of one particular race. The evidence also dispels false rumors and other fallacies regarding bussing. For example, the National Safety Council statistics, put in evidence, demonstrate that bussing is by far the safest means of getting children to and from school. And whatever the real or asserted concerns of parents, the evidence is without dispute in showing that children enjoy bussing.
>
> The evidence further shows that the problem of getting parent and child together in emergency situations is not aggravated by bussing. One reason is that many school authorities provide for one or more vehicles serving each school zone to be equipped with radios and to operate on a standby or cruising basis for such emergencies. The San Francisco school authorities, as stated in testimony on their behalf, will make such arrangements.
>
> It should be noted, too, that the Supreme Court itself, speaking through Chief Justice Burger, recently pointed out (in Swann vs. Charlotte-Mecklenburg Board of Education, 39 U.S.L.S. 4437, 4446 (U.S. April 20, 1971):
>
> '. . .Bus transportation has been an integral part of the public education system for years, and was perhaps the single most important factor in the transition from the one-room school-house to the consolidated school. Eighteen million of the nation's public school children, approximately 39% were transported

> to their schools by bus in 1969-1970 in all parts of the country.' (Emphasis added.)"

Each of the three decisions struggled with the concept of de facto versus de jure segregation. While neither stated that no such legal distinction can exist in public schools because the schools, and everything they do is de jure, Judge Max F. Dentz in the Inglewood case came close to recognizing that obvious truth. He wrote:

> "The de facto vs. de jure distinction drawn in many recent cases appear to be contrived as a means used to distinguish, and attempt to avoid the effects of the Brown and other United States Supreme Court cases requiring integration in the schools. De facto in this sense implies lack of affirmative action by school or governmental authority causing the segregation. This may, as here, be a fiction where even so-called de facto may become de jure simply by virtue of increasing racial imbalance coupled with a deliberate refusal by school authorities to take corrective measures, thus affirming the status quo."

Earlier in his excellent opinion, Judge Dentz recognized the Inglewood racial imbalance as representing ". . . a factual situation that is as near to pure de facto segregation as one is likely to find, i.e., racial imbalance in schools existing by virtue of a settlement of large numbers of black families in previously established school zones and with very little affirmative action on the part of the school authorities."

The evidence in the Inglewood case showed that when the school zones were fixed in 1960 under the "neighborhood schools" policy, there were virtually no black students in the pupil population of the district. Hence, as those zones were originally fixed, they certainly did not cause or aggravate any racial imbalance problem because none existed. Soon after the zones were set, black families began moving into the

district in large numbers. By 1970, one elementary school was 85% black and another was 74% black. The other eleven elementary schools of the district were virtually all white.[58]

While Judge Dentz in the Inglewood case at least recognized the fact that the differences between de facto and de jure segregation in the public schools is often fictional, and frequently resorted to by those who wish to avoid the full impact of the 1954 U.S. Supreme Court desegregation case, Judge Weigel in the San Francisco case thought the difference between the two kinds of segregation to be quite clear. In these words he sought to articulate that difference:

> "In legal terms,'de facto' is often used as an opposite of 'de jure'. It is not difficult to illustrate the difference between the two. If a school board has drawn attendance lines so that there is a reasonable racial balance among the children attending a given school and if, thereafter, solely due to movement of the neighborhood population, the school attendance becomes racially imbalanced, the segregation then arising is de facto. On the other hand, if the school board, as in this case has drawn attendance lines year after year knowing that the lines maintain or heighten racial imbalance, the resulting segregation is de jure."

Since Judge Weigel was careful to point out that the situation disclosed by evidence in the San Francisco case proved the existence of de jure segregation, it is reasonable to assume that he deemed the differences between de facto and de jure to be clear and significant. His clear distinction between the two, however, falls under careful analysis because it is based upon the situation which existed at the time the school zones were set, and would seemingly impose no affirmative duty upon school officials to exercise continued surveillance over the ethnic composition of the student population. Such inaction by a school district would

certainly "enforce" and "perpetuate" racial imbalance in its schools. We doubt that Judge Weigel would for a moment tolerate racial imbalance in the public schools merely because no new zone lines had been fixed by the district since such imbalance occurred.

We suspect that what Judge Weigel meant, but did not say, was that in legal proceedings those seeking to enjoin racial imbalance in the public schools, must show more than the mere fact of its existence. In his view, as we interpret it, there must always be shown some other act by the state or district which tends to encourage or perpetuate the imbalance. We submit that such additional act may always be found in a failure to correct it within a reasonable time by all feasible means. Thus, we again see that the distinction between de facto and de jure public school racial imbalance is meaningless and useless as a tool for understanding or solving the problems involved.

Judges, like those in the Los Angeles, Inglewood, San Francisco, Sacramento and Denver public school racial imbalance cases, who feel that they must continue to find de jure segregation before the 1954 Brown decision can be invoked, will always find facts to justify calling the situation de jure. The following are typical acts which imprint the requisite de jure label upon racial imbalance:

1. Establishment of school attendance areas or zones which result in perpetuation of, or a substantial increase in such imbalance.

2. Construction of new schools in areas so as to intensify such imbalance.

3. Over utilization or under utilization of school facilities in a manner which either perpetuates or increases the imbalance.

4. Assignment of minority ethnic group administrators and teachers to schools with large minority ethnic student populations.

5. Assignment of new and inexperienced or incompetent teachers to schools having predominately minority student populations.

6. Enforcement of a neighborhood school plan, coupled with difficult transfer policies.

7. Refusal to act upon integration plans submitted by experts on school staff or hired as consultants.

8. Yielding to community pressures designed to prevent correction of imbalance by use of buses.

9. Low achievement in minority ethnic schools, thereby indicating lack of equal educational opportunity for the students attending them.

10. Long term existence of racially imbalanced schools, with no efforts at correction.

11. Failure to implement state or federal desegregation guidelines.

Any school district which has racial imbalance in any of its schools is almost certain to be a loser in any litigation brought against it to correct that situation if one or more of the foregoing circumstances is disclosed by the evidence. The de facto claim will be no defense. Judges will call such imbalance de jure and interdict it.

CONCLUSION

In some legal circles, the claim is made that the full impact of the sweeping desegregation decrees issued by the United States Supreme Court in such cases as Swann vs. Charlotte-Mecklenburg School District this spring have no validity in California because North Carolina once had a dual school system created by statute. We know of no such geographical constitutional doctrine, but if one does exist, California is in exactly the

same position as is North Carolina. We have shown that by statute, California also once had a dual school system.

It has been our purpose to demonstrate the distinctions between de facto and de jure racial segregation are meaningless, to say the least, and disappear under close scrutiny. The reason for this view, restated, is that pupils attend school by virtue of a compulsory school attendance statute. They are compelled to go to school in their attendance area and zone, and to a particular school selected by public authorities. If that school is a segregated one, for any reason or cause whatsoever, the pupils who attend it are being compelled in a real and meaningful sense, to go to the segregated school. Thus, the school district is "enforcing" his segregation in every sense of the word. "Enforcement" of segregation by public officials is unconstitutional. We conclude that "de facto" segregation can only be used as a term of confusion and evasion. It has no place in a language which hopes to communicate the message of equal educational opportunity.

Not every school district will have the expertise, staff, or resources to devise workable desegregation plans. For that reason, the state must afford more guidance. The State Board of Education must be compelled to cease the official expression of their private prejudices, and must be made to come forward with a basic statewide desegregation plan designed to effectively deal with the massive racial imbalance it has found to exist in the public schools in California. A state plan could cut across district lines, ignore district attendance zones, and coerce school districts into facing the demands of the constitution and attempting to meet them. This may well leave the State Board of Education with less time to waste on

imposition of moral guidelines upon people to whom continued defiance of the constitution by condoning denial of equality of educational opportunity is itself immoral.

FOOTNOTE REFERENCES

[1]P. 89, Calif. Const., Published 1971 by the California Senate

[2]Adopted by Constitutional Convention which met in Monterey, California on September 1, 1849.

[3]Art. IX, Sec. 2

[4]Report to Sacramento Historical Landmarks Commision

[5]California General Laws 1869-70, Page 838

[6]Sec. 117 San Francisco Board of Education Rules

[7]Ward vs. Flood, 48 Cal 36

[8]Ward vs. Flood, supra at page 39

[9]18 Mich. 401

[10]Clark vs. Board of Directors, 24 Iowa 267

[11]Plessy vs. Ferguson, 163 U.S. 537

[12]Ward vs. Flood, 48 Cal 36, 41

[13]Ward vs. Flood, supra at p. 57

[14]Ward vs. Flood, supra at p. 45

[15]Ward vs. Flood, supra

[16]Section 1669 et. seg., California Political Code

[17]Amendments of 1880, p. 47

[18]Tape vs. Hurley, 66 Cal. 473. There it was held that Sec. 1662 of the Political Code, as amended in 1880, provided for admission of all children to the public schools, and hence San Francisco had no authority to exclude those of Chinese descent.

[19]Wong Him vs. Callahan, 119 Fed. 38

[20]Plessy vs. Ferguson

[21]Education Code Sections 8003 and 8004

[22]Piper vs. Big Pine School Dist., 193 Cal. 664

[23]Westminister School Dist. vs. Mendez, 161 Fed. 2d 774

[24]Wysinger vs. Crookshank, 82 Cal 588

[25]Brown vs. Board of Education, 347 US 483

[26]Westminister School Dist. vs. Mendez, 161 Fed. 2d 774

[27]Dowell vs. School Board of Oklahoma, 244 F. Supp 771, 781. See also, Taylor vs. Board of Education, 294 F 2d 36

[28]Downs vs. Board of Education, 336 F 2d 988; Bell vs. School City, 324 F. 2d 209

[29]The Court said that "If school authorities fail in their affirmative obligations under these holdings, judicial authority may be invoked". See, also: 20 Vanderbilt Law Review 1336

[30]391 U.S. 430 (1968)

[31]391 U.S. 430, 439

[32]347 U.S. 483

[33]39 L.W. 4437

[34]Downs vs. Board of Education, 336 F 2d 988

[35]Green vs. County School Board, 391 U.S. 430, 439

[36]Mulkey vs. Reitman, 387 U.S. 369

[37]81 Harvard Law Review, 69, 73

[38]59 Cal 2d 876 (1963)

[39]Jackson vs. Pasadena City School Dist. 59 Cal 2d 883 at 881

[40]Robert L. Carter, distinquished constitutional lawyer, and formerly General Counsel for the N.A.A.C.P., held the view that racial imbalance and de facto segregation may be used as synonyms. 16 Western Reserve Law Review 502 (1965). It seems clear though, that imbalance could result from deliberate school district action,

while so-called de facto segregation never could have such origin. The term "de facto segregation" has caused confusion by obscuring the issues, and should quickly pass from our language.

[41]U.S. and Calif. Constitutions, Publication of Calif. State Senate 1971, at page 97

[42]These cases are cited in the historical section of this paper. There is nothing in Jackson vs. Pasadena School Dist., 59 Cal 2d 576 to indicate that the petitioner acted for anyone except himself. Even in Inglewood case, filed under number 973669 in Los Angeles County Superior Court as Johnson et al vs. Inglewood Unified School District, the class action concept is not used.

[43]Crawford et al vs. Los Angeles Board of Education, Los Angeles Superior Court case no. 822854; Nathaniel S. Colley, Jr., vs. State Board of Education, Sacramento County Superior Court No. 201941; Hernandez et al vs. Board of Education of Stockton Unified School Dist., San Joaquin County Superior Court No. 101016; Johnson et al vs. San Francisco Unified School District, U.S. Dist. Court, Northern Dist. of Calif., Civil No. 701331.

[44]People vs. San Diego Unified School Dist., San Diego Superior Court No. 312080

[45]The original guidelines were Sections 2010 and 2011, Title 5 of the California Administrative Code. These sections are now numbered 14020 and 14021 of the same code. The original guidelines are set in a footnote on Page 882 in Jackson vs. Pasadena etc.

[46]Colley vs. State Board of Education, Sacramento County Superior Court No. 201941.

[47]Board Minutes, March 12-13, 1970, "Finding of Emergency".

[48]Board Minutes, March 12-13, 1970, "Finding of Emergency".

[49]The case was brought by the writer through his wife as guardian ad litem for his minor son. See, Colley vs. State Board of Education, Sacramento County Superior Court No. 201941.

[50]Official Minutes, Sept. 1970 Meeting, California State Board of Education

[50a]As a part of the Administrative Code these regulations, like other parts of that code, have full force of law.

[51]Riverside and Berkeley School Districts are outstanding exceptions. Their plans evidently sprang from community pressure, and an official desire for correction.

[52]Sacramento, Pasadena, Inglewood, San Diego, Bakersfield, San Francisco, Los Angeles and others.

[53]Report to the State Board of Education, Procedures to Correct Racial and Ethnic Imbalance in California Public Schools. Calif. Dept. of Education, 1970.

[54]The writer as counsel for the N.A.A.C.P. together with a committee of volunteer attorneys, will file this action prior to September 30, 1971.

[55]Crawford et al vs. Los Angeles School Dist. Civil Action No 822854 Los Angeles County Superior Court.

[56]Johnson et al vs. San Francisco Unified School Dist. U.S. Dist. Ct., Northern Dist. of California, Civil Action No. c-70 1331

[57]Johnson et al vs. Inglewood Unified School District, Los Angeles Superior Court, Civil Action No. 973 669

[58]Opinion and findings in Johnson vs. Inglewood Unified School Dist. Los Angeles County Superior Court No. 973669